

BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

PHILIP GUSTAVE MARTIN
3432 Gurnard Avenue
San Pedro, CA 90732

Physician's and Surgeon's
Certificate Number A 45448

Case No. 06-2004-160928

OAH No. L2005070940

DECISION AFTER NON-ADOPTION

This matter was heard by Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, on October 27, 28, and 31, 2005, in Los Angeles, California. Christopher Leong, Deputy Attorney General, represented complainant David T. Thornton. Fredrick M. Ray, Attorney at Law, represented respondent.

Complainant seeks to revoke respondent's alleged sexual misconduct with two patients. Respondent does not dispute the allegations, but presented evidence in rehabilitation. Oral and documentary evidence, and evidence by oral stipulation on the record, was received at the hearing and the matter was submitted to the Administrative Law Judge for decision. A proposed decision was issued dated November 15, 2005.

The proposed decision of the administrative law judge was submitted to the Division of Medical Quality, Medical Board of California (hereafter "division"). After due consideration thereof, the division declined to adopt the proposed decision and, on January 23, 2006, issued a Notice of Non-Adoption of the Proposed Decision. Both parties submitted written argument and oral argument was heard on May 11, 2006. Pursuant to Government Code section 11517, Panel B of the division hereby makes the following decision and order.

FACTUAL FINDINGS

1. Complainant filed the Accusation, on April 18, 2005, solely in his official capacity as Executive Director, Medical Board of California (Board).

2. The Board issued physician's and surgeon's certificate number A 45448 to respondent on October 24, 1988, which certificate expires September 30, 2006, unless renewed.

3. Respondent was born on September 24, 1954. He obtained his medical degree from the American University of the Caribbean in Plymouth, Montserrat, West Indies, on March 8, 1986. He thereafter completed a one-year family practice internship and a one-year surgery residency in Philadelphia and Johnstown, Pennsylvania, respectively.

4. Respondent has worked as an emergency medicine physician his entire professional life.

5. In January 2000, respondent enrolled in the Board's Diversion Program for addiction to marijuana, which he successfully completed approximately five years later. He started using the drug while in high school and used it in medical school and during work as a physician. His sobriety date is January 27, 2000 and continues to attend 12-step meetings to maintain sobriety.

6. On June 20, 2005, Ralph B. Dash, Administrative Law Judge, Office of Administrative Hearings, issued an Interim Order of Suspension suspending respondent's license to practice medicine, pending the outcome of proceedings to permanently discipline respondent's license. The events that led to the suspension are those set forth in factual finding numbers 7 and 8.

7. On July 21, 2003, patient Deborah F.¹ went to the emergency room at a local hospital for treatment of a thyroid crisis. During his examination and treatment of the patient, respondent rubbed his groin area against the patient's knee and feet.

8. On June 6, 2004, patient Cindy F., who was 36 weeks pregnant at the time, was admitted to the emergency room at a local hospital after she slipped and fell. Respondent rubbed his groin area against the patient's feet and elbow.

9. Respondent engaged in the conduct set forth in factual finding numbers 7 and 8 for his own sexual gratification and had an erection in each instance.

10. a. On December 3, 2004, Investigator Michael A. Buttitta (Buttitta) interviewed respondent and asked about the allegations raised by patients Deborah F. and Cindy F. Respondent denied any inappropriate touching, which statements were false and known to be false.

¹ Initials have been used instead of the patients' last names in order to protect the patients' confidentiality.

b. Respondent's statements to Investigator Buttitta constitute acts involving dishonesty that are substantially related to the qualifications, functions, and duties of a physician.

11. Respondent candidly testified about his frotteurism. It started in 1996, at a time of stress and while using marijuana at work. It continued thereafter at a rate of two incidents each week, involving patients in the emergency room.

12. Respondent decided to seek treatment for his problem after the interview by Investigator Buttitta. He reported the problem to the Diversion Program staff who recommended psychiatric evaluation and treatment.

13. Respondent commenced treatment with Lee Blackwell, Ph.D. (Blackwell) in December 2004, which treatment he interrupted during in-patient treatment.

14. At the suggestion of his Diversion Manager, respondent entered the Sexual Offenders Unit of the National Treatment Center at Del Amo Hospital (Del Amo), on December 23, 2004. He remained as an in-patient until February 2, 2005, successfully completing the longer and more intense sex offender program. The Del Amo program is a cognitive-behavioral program that treats addiction as a key component of offending sexual behavior. The program does not admit violent sex offenders and has a small number (four to eight) of patients enrolled at any given time.

15. John R. Sealy, M.D. (Sealy), the Program Director and co-founder of the Del Amo program, testified as respondent's treating physician and provided expert testimony. He is an expert in the treatment of sexual deviants and has provided training to Board investigators. He was a very credible witness, as his testimony was direct, matter-of-fact, and based on his vast scientific knowledge and experience. He did not minimize respondent's problem, was critical of his initial missteps, and did not embellish respondent's prognosis.

As the only physician in the treatment team that included other mental health and nursing professionals, Dr. Sealy was directly involved in respondent's program at Del Amo. Respondent signed a 12-week celibacy contract at the start of the program, agreeing to forego masturbation, seductive behavior, pornographic material, sexual contact with another person, and to report all sexual fantasizing to staff. He underwent extensive psychological testing, including personality tests and sexual deviance instruments, such as the Sexual Dependency Inventory. He participated in individual and group counseling, including relapse prevention group, anger group, psychodramatic experiential group, art therapy, and addictions group. Respondent also regularly attended meetings of several 12-step-based groups, such as Sex Addicts Anonymous (SAA), Sex and Love Addicts Anonymous, Narcotics Anonymous, and Alcoholics Anonymous.

Dr. Sealy testified that respondent was fully accountable for his frotteurism and was open in his discussion of the problem. Dr. Sealy did not sense any minimization on

the part of respondent. Respondent fully participated in the program and complied with all its requirements. In Dr. Sealy's opinion, confirmed by respondent's own testimony, respondent grasped the principles of recovery and techniques for relapse prevention; respondent demonstrated genuine remorse for the pain and suffering he caused; respondent was able to demonstrate empathy for others, which was demonstrated during participation in group meetings that included victims of sexual abuse. In Dr. Sealy's opinion, respondent's prognosis, based on his completion of the Del Amo program, is guarded to good, assuming he continues with his continuing recovery plan.

Dr. Sealy issued the following final Axis I diagnoses: Sexual Disorder, Not Otherwise Specified, with addictive and exploitive features; Frotteurism, by history; and Marijuana Dependence, by history.

With the assistance and approval of Dr. Sealy, respondent designed a Continuing Recovery Plan (CRP) to assist with recovery after discharge from Del Amo. The CRP contains the following elements: continued psychotherapy; maintenance of a Personal Crazy Index, intended to give early signs of potential acting out behavior; continued attendance to 12-step meetings, including 90 meetings in the first 90 days post discharge; continued regular work with others in recovery, at least once daily; no treatment of female patients for a period of two years; reevaluation after two years and, if approved to treat female patients, to only treat female patients in the presence of a female chaperone; and strict adherence to professional boundaries.

16. Respondent was discharged from Del Amo on February 2, 2005. Rather than attempting to return to the practice of medicine, respondent opted for other work to concentrate on his recovery. He has been employed by Rescue Rooter in Orange County, a drain-cleaning service, since June 2005.

17. Respondent resumed his weekly sessions with Dr. Blackwell after discharge from Del Amo until March 28, 2005, when he commenced treatment with Michael Alvarez, M.F.C.C. (Alvarez). Dr. Blackwell noticed immediate improvement after the discharge from Del Amo, particularly in the areas of victim empathy and tools to prevent relapse. In his opinion, respondent's prognosis was fair to good, in large part because the paraphilia developed late in life and because of respondent's willingness to take responsibility and address the problem.

18. Respondent started attending individual and group meetings with Alvarez on April 5, 2005. He changed from Dr. Blackwell for reasons of cost and proximity to his home. Alvarez was a co-founder of Del Amo with Dr. Sealy and is now in private practice. Alvarez obtained the Del Amo records and met with respondent individually for three sessions before deciding that respondent was ready for the group sessions. The six-person group meets three times each month, with Alvarez as the facilitator. The group addresses issues regarding sexual addiction and sexual offensive behavior. In Alvarez' opinion, respondent is a full participant in the meetings and has good skills to manage his

impulsivity. In light of respondent's continued growth and progress at Del Amo, Alvarez believes that respondent's prognosis for recovery is very good.

19. Respondent has completed 169 SAA meetings from February 3 to October 20, 2005. Although he failed to attend 90 meetings in the first 90 days after his release, he subsequently attended 90 meetings in 90 consecutive days. He currently attends 3 meetings per week.

20. Respondent expressed sincere remorse about his sexual misconduct and its impact on the victims.

21. Respondent submitted six letters from those familiar with his rehabilitation efforts, which attest to his commitment to the program and to his good character.

22. The Board incurred \$13,619.50 in Attorney General's Office charges as its costs of enforcement and prosecution of this matter.

LEGAL CONCLUSIONS

1. Cause exists to discipline respondent's certificate pursuant to Business and Professions Code² section 726 in that he engaged in acts of sexual misconduct, by reason of factual finding numbers 7, 8, and 9.

2. Cause exists to discipline respondent's certificate pursuant to section 2234, subdivision (b), in that he engaged in gross negligence, by reason of factual finding numbers 7, 8, and 9.

3. Cause exists to discipline respondent's certificate pursuant to section 2234, subdivision (e), in that he committed acts involving dishonesty that are substantially related to the qualifications, functions, and duties of a physician, by reason of factual finding numbers 7, 8, 9, and 10.

4. Cause exists to discipline respondent's certificate pursuant to section 2234 for unprofessional conduct, by reason of factual finding numbers 7, 8, 9, and 10 and legal conclusion numbers 1, 2, and 3.

5. All evidence presented in rehabilitation has been considered. This evidence is substantial and shows respondent's commitment to remedy his problem. At the same time, the frotteurism problem is long-standing and still needs to be addressed. The conditions set forth below will enable respondent to practice with a patient population to which he does not pose a threat and will enable experts to further monitor his progress. The Order set forth below is necessary and sufficient for the protection of the public.

² All further references are to the Business and Professions Code.

ORDER

Physician's and Surgeon's Certificate No. A 45448 issued to respondent Philip Gustave Martin, M.D. is hereby revoked. However, the revocation is stayed and respondent's certificate is placed on probation for seven (7) years upon the following terms and conditions:

1. Work-site Monitor. At any time respondent is working, a physician and surgeon with a current and unrestricted certificate issued by the Board must be present at his work-site and must observe and interact with respondent during respondent's daily practice.
2. Practice Restriction. During probation, respondent is prohibited from treating female patients unless this provision is modified pursuant to paragraph 3 of this Order.
3. Psychiatric Evaluation. On or about February, 2007, respondent shall undergo and complete a psychiatric evaluation (and psychological testing, if deemed necessary) by Dr. Sealy, who shall consider any information provided by the Division or its designee and any other information the psychiatrist deems relevant, and shall furnish a written evaluation report to the Division or its designee. Psychiatric evaluations conducted prior to the effective date of the Decision shall not be accepted towards the fulfillment of this requirement.

If Dr. Sealy is unwilling or unable to perform the evaluation, then another physician approved by the Division shall perform the evaluation who has not previously expressed an opinion on respondent's fitness.

Respondent shall comply with all restrictions or conditions recommended by the evaluating psychiatrist within 15 calendar days after being notified by the Division or its designee. Failure to undergo and complete a psychiatric evaluation and psychological testing, or comply with the required additional conditions or restrictions, is a violation of probation.

The Division or its designee may permit respondent to treat female patients with the restriction described in paragraph 4 of this Order if both Dr. Sealy and a Division-appointed, board-certified psychiatrist agree that respondent is mentally fit to practice medicine safely on female patients. Respondent shall undergo and complete a psychiatric evaluation (and psychological testing, if deemed necessary) by the Division appointed psychiatrist, who shall consider any information provided by the Division or its designee and any other information the psychiatrist deems relevant, and shall furnish a written evaluation report to the Division or its designee. Respondent shall not treat any female patients until authorized to do so in writing by the Division or its designee.

Respondent shall pay the cost of all psychiatric evaluations and psychological testing.

4. Third Party Chaperone. If permitted to treat female patients following the evaluations set forth in paragraph 3 of this Order, respondent shall have a female third party chaperone present while consulting, examining or treating female patients. Respondent shall, within 30 calendar days of being permitted to examine or treat female patients, submit to the Division or its designee for prior approval name(s) of persons who will act as the third party chaperone. Each third party chaperone shall initial and date each patient medical record at the time the chaperone's services are provided. Each third party chaperone shall read this Decision to fully understand the role of the third party chaperone.

Respondent shall maintain a log of all patients seen for whom a third party chaperone is required. The log shall contain the: 1) patient name, address and telephone number; 2) medical record number; and 3) date of service. Respondent shall keep this log in a separate file or ledger, in chronological order, shall make the log available for immediate inspection and copying on the premises at all times during business hours by the Division or its designee, and shall retain the log for the entire term of probation. Failure to maintain a log of all patients requiring a third party chaperone, or to make the log available for immediate inspection and copying on the premises, is a violation of probation.

5. Notification. Prior to engaging in the practice of medicine the respondent shall provide a true copy of the Decision(s) and Accusation(s) to the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to respondent, at any other facility where respondent engages in the practice of medicine, including all physician and locum tenens registries or other similar agencies, and to the Chief Executive Officer at every insurance carrier which extends malpractice insurance coverage to respondent. Respondent shall submit proof of compliance to the Division or its designee within 15 calendar days.

This condition shall apply to any change(s) in hospitals, other facilities or insurance carrier.

6. Supervision of Physician Assistants. During probation, respondent is prohibited from supervising physician assistants.

7. Obey All Laws. Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California and remain in full compliance with any court ordered criminal probation, payments, and other orders.

8. Quarterly Declarations. Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Division, stating whether there has

been compliance with all the conditions of probation. Respondent shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.

9. Probation Unit Compliance. Respondent shall comply with the Division's probation unit. Respondent shall, at all times, keep the Division informed of respondent's business and residence addresses. Changes of such addresses shall be immediately communicated in writing to the Division or its designee. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code section 2021(b).

Respondent shall not engage in the practice of medicine in respondent's place of residence. Respondent shall maintain a current and renewed California physician's and surgeon's license.

Respondent shall immediately inform the Division or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty (30) calendar days.

10. Interview with the Division or its Designee. Respondent shall be available in person for interviews either at respondent's place of business or at the probation unit office, with the Division or its designee upon request at various intervals and either with or without prior notice throughout the term of probation.

11. Residence or Practice Outside of California. In the event respondent should leave the State of California to reside or to practice respondent shall notify the Division or its designee in writing 30 calendar days prior to the dates of departure and return. Non-practice is defined as any period of time exceeding thirty calendar days in which respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program outside the State of California which has been approved by the Division or its designee shall be considered as time spent in the practice of medicine within the State. A Board-ordered suspension of practice shall not be considered as a period of non-practice. Periods of temporary or permanent residence or practice outside California will not apply to the reduction of the probationary term. Periods of temporary or permanent residence or practice outside California will relieve respondent of the responsibility to comply with the probationary terms and conditions with the exception of this condition and the following terms and conditions of probation: Obey All Laws; Probation Unit Compliance; and Cost Recovery.

Respondent's license shall be automatically cancelled if respondent's periods of temporary or permanent residence or practice outside California totals two years. However, respondent's license shall not be cancelled as long as respondent is residing and practicing medicine in another state of the United States and is on active probation

with the medical licensing authority of that state, in which case the two year period shall begin on the date probation is completed or terminated in that state.

12. Failure to Practice Medicine – California Resident. In the event respondent resides in the State of California and for any reason respondent stops practicing medicine in California, respondent shall notify the Division or its designee in writing within 30 calendar days prior to the dates of non-practice and return to practice. Any period of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary term and does not relieve respondent of the responsibility to comply with the terms and conditions of probation. Non-practice is defined as any period of time exceeding thirty calendar days in which respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program which has been approved by the Division or its designee shall be considered time spent in the practice of medicine. For purposes of this condition, non-practice due to a Board-ordered suspension or in compliance with any other condition of probation, shall not be considered a period of non-practice.

Respondent's license shall be automatically cancelled if respondent resides in California and for a total of two years, fails to engage in California in any of the activities described in Business and Professions Code sections 2051 and 2052.

13. Completion of Probation. Respondent shall comply with all financial obligations (e.g., cost recovery, restitution, probation costs) not later than 120 calendar days prior to the completion of probation. Upon completion successful of probation, respondent's certificate shall be fully restored.

14. Violation of Probation. Failure to fully comply with any term or condition of probation is a violation of probation. If respondent violates probation in any respect, the Division, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation, or Petition to Revoke Probation, or an Interim Suspension Order is filed against respondent during probation, the Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

15. License Surrender. Following the effective date of this Decision, if respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, respondent may request the voluntary surrender of respondent's license.

The Division reserves the right to evaluate respondent's request and to exercise its discretion whether or not to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances.

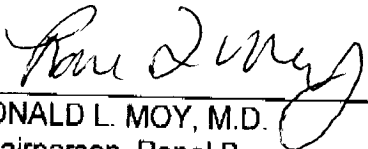
Upon formal acceptance of the surrender, respondent shall within 15 calendar days deliver respondent's wallet and wall certificate to the Division or its designee and respondent shall no longer practice medicine. Respondent will no longer be subject to the terms and conditions of probation and the surrender of respondent's license shall be deemed disciplinary action.

If respondent re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

16. Probation Monitoring Costs. Respondent shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Division, which may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of California and delivered to the Division or its designee no later than January 31 of each calendar year. Failure to pay costs within 30 calendar days of the due date is a violation of probation.

This decision shall become effective on the 26 day of June, 2006.

IT IS SO ORDERED this 25 day of May, 2006.



RONALD L. MOY, M.D.
Chairperson, Panel B
Division of Medical Quality
Medical Board of California

**BEFORE THE
DIVISION OF MEDICAL QUALITY
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
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In the Matter of the Accusation Against:)

PHILIP GUSTAVE MARTIN, M.D.)

Physician's & Surgeon's)

Certificate No.: A - 45448)

Respondent)

Case No.: 06-2004-160928

OAH No.: L2005070940

**NOTICE OF NON-ADOPTION
OF PROPOSED DECISION**

The Proposed Decision of the Administrative Law Judge in the above-entitled matter has been **non-adopted**. The Medical Board of California, Division of Medical Quality, will decide the case upon the record, including the transcript and exhibits of the hearing, and upon such written argument as the parties may wish to submit, including in particular, argument directed to the question of whether the proposed penalty should be modified. The parties will be notified of the date for submission of such argument when the transcript of the above-mentioned hearing becomes available.

To order a copy of the transcript, please contact Karen Napolitano, Transcript Coordinator, Kennedy Court Reporters, Inc. at (714) 835-0366.

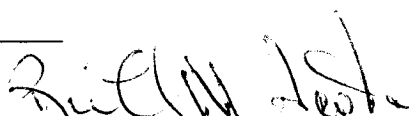
To order a copy of the exhibits, please contact the Transcript Clerk, Office of Administrative Hearings, 320 West Fourth Street, 6th Floor, Suite 630, Los Angeles CA 90013. Telephone number (213) 576-7200.

In addition to written argument, oral argument will be scheduled if any party files with the Division within 20 days from the date of this notice a written request for oral argument. If a timely request is filed, the Division will serve all parties with written notice of the time, date and place for oral argument. Oral argument shall be directed only to the question of whether the proposed penalty should be modified. Please do not attach to your written argument any documents that are not part of the record as they cannot be considered by the Panel.

Please remember to serve the opposing party with a copy of your written argument and any other papers you might file with the Division. The mailing address of the Division is as follows:

Division of Medical Quality
MEDICAL BOARD OF CALIFORNIA
1426 Howe Avenue
Sacramento, CA 95825-3236
(916) 263-8906

Dated: January 23, 2006



Richard M. Acosta
Enforcement Legal Unit

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3. Cause exists to discipline respondent's certificate pursuant to section 2234, subdivision (e), in that he committed acts involving dishonesty that are substantially related to the qualifications, functions, and duties of a physician, by reason of factual finding numbers 7, 8, 9, and 10.

4. Cause exists to discipline respondent's certificate pursuant to section 2234 for unprofessional conduct, by reason of factual finding numbers 7, 8, 9, and 10 and legal conclusion numbers 1, 2, and 3.

5. The costs of investigation and enforcement pursuant to section 125.3 are \$13,619.50, by reason of factual finding number 22 and legal conclusion numbers 1, 2, 3, and 4.

In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, the Supreme Court rejected a constitutional challenge to a cost regulation similar to section 125.3. In so doing, however, the Court directed the administrative law judge and the agency to evaluate several factors to ensure that the cost provision did not deter individuals from exercising their right to a hearing. Thus, the board must not assess the full costs where it would unfairly penalize the respondent who has committed some misconduct, but who has used the hearing process to obtain the dismissal of some charges or a reduction in the severity of the penalty; the board must consider a respondent's subjective good faith belief in the merits of his or her position and whether the respondent has raised a colorable challenge; the board must consider a respondent's ability to pay; and the board may not assess disproportionately large investigation and prosecution costs when it has conducted a disproportionately large investigation to prove that a respondent engaged in relatively innocuous misconduct. (*Zuckerman v. State Board of Chiropractic Examiners, supra* at p. 45).

² All further references are to the Business and Professions Code.

In this case, after giving due consideration to respondent's ability to pay, as evidenced by his employment situation, it is reasonable to reduce the costs by one third, to \$9,533.65 and to allow respondent to make monthly payments of \$113.50 during the period of probation. This will also enable respondent to pay for yearly probation monitoring and for the cost of other terms and conditions of probation.

6. All evidence presented in rehabilitation has been considered. This evidence is substantial and shows respondent's commitment to remedy his problem. At the same time, the frotteurism problem is long-standing and still needs to be addressed. The conditions set forth below will enable respondent to practice with a patient population to which he does not pose a threat and will enable experts to further monitor his progress. The Order set forth below is necessary and sufficient for the protection of the public.

ORDER

Physician's and Surgeon's Certificate No. A 45448 issued to respondent Philip Gustave Martin, M.D. is hereby revoked. However, the revocation is stayed and respondent's certificate is placed on probation for seven (7) years upon the following terms and conditions.

1. Practice Restriction. During probation, respondent is prohibited from treating female patients.

2. Psychiatric Evaluation. On or about February 2007, respondent shall undergo and complete a psychiatric evaluation (and psychological testing, if deemed necessary) by Dr. Sealy, who shall consider any information provided by the Division or designee and any other information the psychiatrist deems relevant, and shall furnish a written evaluation report to the Division or its designee. Psychiatric evaluations conducted prior to the effective date of the Decision shall not be accepted towards the fulfillment of this requirement. Respondent shall pay the cost of all psychiatric evaluations and psychological testing.

Respondent shall comply with all restrictions or conditions recommended by Dr. Sealy within 15 calendar days after being notified by the Division or its designee. Failure to undergo and complete a psychiatric evaluation and psychological testing, or comply with the required additional conditions or restrictions, is a violation of probation. Respondent shall not treat any female patients until notified by the Division or its designee that respondent is mentally fit to practice medicine safely.

If Dr. Sealy is unwilling or unable to perform the evaluation, then the evaluation shall be performed by another physician who has not previously expressed an opinion on respondent's fitness.

3. Third Party Chaperone. If permitted to treat female patients following the evaluation set forth in Condition number 2, respondent shall have a third party chaperone present while consulting, examining or treating female patients. Respondent shall, within 30 calendar days of being permitted to examine or treat female patients, submit to the Division or its designee for prior approval name(s) of persons who will act as the third party chaperone. Each third party chaperone shall initial and date each patient medical record at the time the chaperone's services are provided. Each third party chaperone shall read this Decision to fully understand the role of the third party chaperone.

Respondent shall maintain a log of all patients seen for whom a third party chaperone is required. The log shall contain the: 1) patient name, address and telephone number; 2) medical record number; and 3) date of service. Respondent shall keep this log in a separate file or ledger, in chronological order, shall make the log available for immediate inspection and copying on the premises at all times during business hours by the Division or its designee, and shall retain the log for the entire term of probation. Failure to maintain a log of all patients requiring a third party chaperone, or to make the log available for immediate inspection and copying on the premises, is a violation of probation.

4. Notification. Prior to engaging in the practice of medicine the respondent shall provide a true copy of the Decision(s) and Accusation(s) to the Chief of Staff or the Chief Executive Officer at every hospital where privileges or membership are extended to respondent, at any other facility where respondent engages in the practice of medicine, including all physician and locum tenens registries or other similar agencies, and to the Chief Executive Officer at every insurance carrier which extends malpractice insurance coverage to respondent. Respondent shall submit proof of compliance to the Division or its designee within 15 calendar days.

This condition shall apply to any change(s) in hospitals, other facilities or insurance carrier.

5. Supervision of Physician Assistants. During probation, respondent is prohibited from supervising physician assistants.

6. Obey All Laws. Respondent shall obey all federal, state and local laws, all rules governing the practice of medicine in California and remain in full compliance with any court ordered criminal probation, payments, and other orders.

7. Quarterly Declarations. Respondent shall submit quarterly declarations under penalty of perjury on forms provided by the Division, stating whether there has been compliance with all the conditions of probation. Respondent shall submit quarterly declarations not later than 10 calendar days after the end of the preceding quarter.

8. Probation Unit Compliance. Respondent shall comply with the Division's probation unit. Respondent shall, at all times, keep the Division informed of respondent's business and residence addresses. Changes of such addresses shall be immediately communicated in writing to the Division or its designee. Under no circumstances shall a post office box serve as an address of record, except as allowed by Business and Professions Code section 2021(b).

Respondent shall not engage in the practice of medicine in respondent's place of residence. Respondent shall maintain a current and renewed California physician's and surgeon's license.

Respondent shall immediately inform the Division or its designee, in writing, of travel to any areas outside the jurisdiction of California which lasts, or is contemplated to last, more than thirty (30) calendar days.

9. Interview with the Division or its Designee. Respondent shall be available in person for interviews either at respondent's place of business or at the probation unit office, with the Division or its designee upon request at various intervals and either with or without prior notice throughout the term of probation.

10. Residence or Practice Outside of California. In the event respondent should leave the State of California to reside or to practice respondent shall notify the Division or its designee in writing 30 calendar days prior to the dates of departure and return. Non-practice is defined as any period of time exceeding thirty calendar days in which respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program outside the State of California which has been approved by the Division or its designee shall be considered as time spent in the practice of medicine within the State. A Board-ordered suspension of practice shall not be considered as a period of non-practice. Periods of temporary or permanent residence or practice outside California will not apply to the reduction of the probationary term. Periods of temporary or permanent residence or practice outside California will relieve respondent of the responsibility to comply with the probationary terms and conditions with the exception of this condition and the following terms and conditions of probation: Obey All Laws; Probation Unit Compliance; and Cost Recovery.

Respondent's license shall be automatically cancelled if respondent's periods of temporary or permanent residence or practice outside California totals two years. However, respondent's license shall not be cancelled as long as respondent is residing and practicing medicine in another state of the United States and is on active probation with the medical licensing authority of that state, in which case the two year period shall begin on the date probation is completed or terminated in that state.

11. Failure to Practice Medicine – California Resident. In the event respondent resides in the State of California and for any reason respondent stops practicing medicine in California, respondent shall notify the Division or its designee in writing within 30 calendar days prior to the dates of non-practice and return to practice. Any period of non-practice within California, as defined in this condition, will not apply to the reduction of the probationary term and does not relieve respondent of the responsibility to comply with the terms and conditions of probation. Non-practice is defined as any period of time exceeding thirty calendar days in which respondent is not engaging in any activities defined in sections 2051 and 2052 of the Business and Professions Code.

All time spent in an intensive training program which has been approved by the Division or its designee shall be considered time spent in the practice of medicine. For purposes of this condition, non-practice due to a Board-ordered suspension or in compliance with any other condition of probation, shall not be considered a period of non-practice.

Respondent's license shall be automatically cancelled if respondent resides in California and for a total of two years, fails to engage in California in any of the activities described in Business and Professions Code sections 2051 and 2052.

12. Completion of Probation. Respondent shall comply with all financial obligations (e.g., cost recovery, restitution, probation costs) not later than 120 calendar days prior to the completion of probation. Upon completion successful of probation, respondent's certificate shall be fully restored.

13. Violation of Probation. Failure to fully comply with any term or condition of probation is a violation of probation. If respondent violates probation in any respect, the Division, after giving respondent notice and the opportunity to be heard, may revoke probation and carry out the disciplinary order that was stayed. If an Accusation, or Petition to Revoke Probation, or an Interim Suspension Order is filed against respondent during probation, the Division shall have continuing jurisdiction until the matter is final, and the period of probation shall be extended until the matter is final.

14. Cost Recovery. Starting with the first month of probation, respondent shall reimburse the Division the amount of \$113.50 per month, or a total of \$9,533.65, for its investigative and prosecution costs. The filing of bankruptcy or period of non-practice by respondent shall not relieve the respondent his/her obligation to reimburse the Division for its costs.

15. License Surrender. Following the effective date of this Decision, if respondent ceases practicing due to retirement, health reasons or is otherwise unable to satisfy the terms and conditions of probation, respondent may request the voluntary surrender of respondent's license.


The Division reserves the right to evaluate respondent's request and to exercise its discretion whether or not to grant the request, or to take any other action deemed appropriate and reasonable under the circumstances.

Upon formal acceptance of the surrender, respondent shall within 15 calendar days deliver respondent's wallet and wall certificate to the Division or its designee and respondent shall no longer practice medicine. Respondent will no longer be subject to the terms and conditions of probation and the surrender of respondent's license shall be deemed disciplinary action.

If respondent re-applies for a medical license, the application shall be treated as a petition for reinstatement of a revoked certificate.

16. Probation Monitoring Costs. Respondent shall pay the costs associated with probation monitoring each and every year of probation, as designated by the Division, which may be adjusted on an annual basis. Such costs shall be payable to the Medical Board of California and delivered to the Division or its designee no later than January 31 of each calendar year. Failure to pay costs within 30 calendar days of the due date is a violation of probation.

DATED: 4/15/05


SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings

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FILED
STATE OF CALIFORNIA
MEDICAL BOARD OF CALIFORNIA
SACRAMENTO April 18, 2005
BY Samuel J. Martin

7
8 **BEFORE THE**
9 **DIVISION OF MEDICAL QUALITY**
10 **MEDICAL BOARD OF CALIFORNIA**
11 **DEPARTMENT OF CONSUMER AFFAIRS**
12 **STATE OF CALIFORNIA**

12 In the Matter of the Accusation Against:

Case No. 06-2004-160928

13 PHILIP GUSTAVE MARTIN, M.D.
14 3432 Gurnard Avenue
San Pedro, California 90732

A C C U S A T I O N

15 Physician and Surgeon's Certificate No. A 45448,
16 Respondent.

17
18 Complainant alleges:

19 PARTIES

20 1. David T. Thornton (Complainant) brings this Accusation solely in his
21 official capacity as the Executive Director of the Medical Board of California (Board),
22 Department of Consumer Affairs.

23 2. On or about October 24, 1988, the Board issued Physician and Surgeon's
24 Certificate No. A 45448 to Philip Gustave Martin, M.D. (Respondent). The Physician and
25 Surgeon's Certificate was in full force and effect at all times relevant to the charges brought
26 herein and will expire on September 30, 2006, unless renewed.

27 JURISDICTION

28 3. This Accusation is brought before the Board's Division of Medical Quality

(Division) under the authority of the following laws. All section references are to the Business and Professions Code unless otherwise indicated.

4. Section 2227 of the Code states:

"(a) A licensee whose matter has been heard by an administrative law judge of the Medical Quality Hearing Panel as designated in Section 11371 of the Government Code, or whose default has been entered, and who is found guilty, or who has entered into a stipulation for disciplinary action with the division, may, in accordance with the provisions of this chapter:

"(1) Have his or her license revoked upon order of the division.

"(2) Have his or her right to practice suspended for a period not to exceed one year upon order of the division.

"(3) Be placed on probation and be required to pay the costs of probation monitoring upon order of the division.

"(4) Be publicly reprimanded by the division.

"(5) Have any other action taken in relation to discipline as part of an order of probation, as the division or an administrative law judge may deem proper.

"(b) Any matter heard pursuant to subdivision (a), except for warning letters, medical review or advisory conferences, professional competency examinations, continuing education activities, and cost reimbursement associated therewith that are agreed to with the division and successfully completed by the licensee, or other matters made confidential or privileged by existing law, is deemed public, and shall be made available to the public by the board pursuant to Section 803.1."

5. Section 2234 of the Code states, in pertinent part:

"The Division of Medical Quality shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

"(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter [Chapter 5, the Medical Practice Act].

1 "(b) Gross negligence.

2 ". . . .

3 "(e) The commission of any act involving dishonesty or corruption which is
4 substantially related to the qualifications, functions, or duties of a physician and surgeon."

5 6. Section 726 of the Code states:

6 "The commission of any act of sexual abuse, misconduct, or relations with a
7 patient, client, or customer constitutes unprofessional conduct and grounds for disciplinary
8 action for any person licensed under this division, under any initiative act referred to in this
9 division and under Chapter 17 (commencing with Section 9000) of Division 3.

10 "This section shall not apply to sexual contact between a physician and surgeon
11 and his or her spouse or person in an equivalent domestic relationship when that physician and
12 surgeon provides medical treatment, other than psychotherapeutic treatment, to his or her spouse
13 or person in an equivalent domestic relationship."

14 7. Section 729 of the Code states, in pertinent part:

15 "(a) Any physician and surgeon . . . who engages in an act of sexual intercourse,
16 sodomy, oral copulation, or sexual contact with a patient or client . . . is guilty of sexual
17 exploitation by a physician and surgeon, psychotherapist, or alcohol and drug abuse counselor.

18 ". . . .

19 "For purposes of subdivision (a), in no instance shall consent of the patient or
20 client be a defense. However, physicians and surgeons shall not be guilty of sexual exploitation
21 for touching any intimate part of a patient or client unless the touching is outside the scope of
22 medical examination and treatment, or the touching is done for sexual gratification.

23 "(c) For purposes of this section:

24 ". . . .

25 "(3) "Sexual contact" means sexual intercourse or the touching of an intimate part
26 of a patient for the purpose of sexual arousal, gratification, or abuse.

27 "(4) "Intimate part" and "touching" have the same meanings as defined in Section
28 243.4 of the Penal Code."

1 8. Section 2246 of the Code states:

2 “Any proposed decision or decision issued under this article that contains any
3 finding of fact that the licensee engaged in any act of sexual exploitation, as described in
4 paragraphs (3) to (5), inclusive, of subdivision (b) of Section 729, with a patient shall contain an
5 order of revocation. The revocation shall not be stayed by the administrative law judge.”

6 9. Section 2232, subdivision (a) of the Code states:

7 “Except as provided in subdivisions (b), (c) , and (d), the board shall promptly
8 revoke the license of any person who, at any time after January 1, 1947, has been required to
9 register as a sex offender pursuant to the provisions of Section 290 of the Penal Code.”

10 General Unprofessional Conduct

11 10. Conduct which breaches the rules or ethical code of a profession or conduct
12 which is unbecoming a member in good standing of a profession also constitutes unprofessional
13 conduct. (*Shea v. Bd. of Medical Examiners*, (1978) 81 Cal.App.3d 564, 575.)

14 COST RECOVERY

15 11. Section 125.3 of the Code provides, in pertinent part, that the Division
16 may request the administrative law judge to direct a licensee found to have committed a
17 violation or violations of the licensing act to pay a sum not to exceed the reasonable costs of the
18 investigation and enforcement of the case.

19 MEDI-CAL REIMBURSEMENT

20 12. Section 14124.12 of the Welfare and Institutions Code states, in pertinent
21 part:

22 “(a) Upon receipt of written notice from the Medical Board of California, the
23 Osteopathic Medical Board of California, or the Board of Dental Examiners of California, that a
24 licensee's license has been placed on probation as a result of a disciplinary action, the department
25 may not reimburse any Medi-Cal claim for the type of surgical service or invasive procedure that
26 gave rise to the probation, including any dental surgery or invasive procedure, that was
27 performed by the licensee on or after the effective date of probation and until the termination of
28 all probationary terms and conditions or until the probationary period has ended, whichever

1 occurs first. This section shall apply except in any case in which the relevant licensing board
2 determines that compelling circumstances warrant the continued reimbursement during the
3 probationary period of any Medi-Cal claim, including any claim for dental services, as so
4 described. In such a case, the department shall continue to reimburse the licensee for all
5 procedures, except for those invasive or surgical procedures for which the licensee was placed on
6 probation.”

7 FIRST CAUSE FOR DISCIPLINE

8 (Sexual Misconduct)

9 13. Respondent is subject to disciplinary action under section 726 of the Code
10 in that he committed acts of sexual misconduct with patients. The circumstances are as follows:

11 14. On or about July 21, 2003, patient Deborah F. went to the emergency room
12 at a local hospital for treatment of a thyroid crisis.¹ As Respondent examined and treated the
13 patient, the patient felt that Respondent had an erection as he rubbed his groin area against her
14 knee and feet. Respondent also made inappropriate comments about his personal life, that he was
15 divorced, had two children and a girlfriend, and that the patient could see him again at another
16 hospital if she wanted to.

17 15. On or about June 6, 2004, patient Cindy F., who was 36 weeks pregnant,
18 was admitted to the emergency room at a local hospital after she fell at a market. As Respondent
19 examined and treated the patient, the patient felt Respondent had an erection as he rubbed his
20 groin area against her feet and the back of her hand.

21 16. At first Respondent denied the allegations made by patients Cindy F. and
22 Deborah F. when he was interviewed by a Medical Board investigator. Thereafter, Respondent
23 sought treatment in a hospital program for sexual addiction problems. He then admitted to the
24 Board’s investigator that he has had problems with frotteurism for years and he has received
25 treatment for his prior abuse of marijuana.

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28 1. Initials are used in this pleading to protect patient privacy. Respondent will be
provided with identifying information if discovery is requested.

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